# AMO REPORTS 86-2

## COMPULSORY AND BINDING ARBITRATION: A PROPOSAL (1984 EDITION)

THE ASSOCIATION OF MUNICIPALITIES OF ONTARIO
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## ASSOCIATION OF MUNICIPALITIES OF ONTARIO

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AMO Report 86-2, "Compulsory and Binding Arbitration: A Proposal", was updated by AMO in February 1984. The report was re-submitted to the new government in January 1986.

# COMPULSORY AND BINDING ARBITRATION: A PROPOSAL

## 1. INTRODUCTION

### 1.1 Background

A highly significant aspect of the regulation of labour relations in the Province of Ontario is the extensive use of compulsory and binding arbitration in the resolution of both rights and interest disputes.

The Labour Relations Act has, for many years, required that all differences involving the application or interpretation of a collective agreement which is in force shall be resolved by some method of binding arbitration so that there shall be no stoppage of work once the collective agreement is in force and during its life. In the most recent amendments to this Act, the procedures are formalized by legislation rather than left to the determination of the parties, and provide for a single arbitrator rather than a three-man board, and provide time limits to assure a speeding up of the process.

The Labour Relations Act has no direct provision for binding arbitration in disputes involving the negotiation of the terms of a new agreement, although the parties to the dispute may agree to submit their differences to binding arbitration.

Under the Act such matters are more usually resolved by the invocation of strike or lockout. The Government of Ontario has nevertheless not hesitated to impose binding arbitration in special instances where it is assumed that the public interest would be threatened if these economic sanctions were to be applied for an extended period. The determination of when the Government should use its sovereign powers and invoke binding arbitration seems based on political considerations, rather than some principle of labour relations or even the extent to which the public is inconvenienced. For example, a public transportation strike in Metropolitan Toronto resulted in early intervention by the Government whereas a similar strike in Cornwall continued for many months and was settled only as a result of the economic pressure of the strike on both parties. A strike of outside workers where all surface traffic comes to a halt because snow was not removed might invoke no intervention.

## 1.2 Existing Legislation: The Police Act, The Fire Departments Act, The Hospital Labour Disputes Arbitration Act

In this submission, the Association's comments are based on the existing legislation. However, due to the extensive efforts of AMO, with the Ministry of the Solicitor General, as well as other affected Provincial organizations, it is expected that significant amendments to the Fire Departments Act and the Police Act are forthcoming.

The legislation governing three areas of concern to municipalities because of their obligation to provide service, disallows (in part) strikes and lockouts in disputes involving the terms of an agreement and provides for binding arbitration immediately upon determination that a settlement is unlikely through the normal bargaining process. These services are police, fire, homes for the aged or nursing homes.[1] While recognizing the significance of these services to the public interest, one must question to what degree this significance is greater than that of other public services coming under municipal responsibility. Many people feel that there is far too much intervention in the process of collective bargaining. If there is to be binding arbitration at all, what are the criteria for including or excluding services in this process of binding intervention?

For example, is the provision of fresh purified water to the citizens of lesser importance that the provision of fire protection? Or has this service been excluded from the binding arbitration process simply because it is easier to provide services by using supervisory personnel in a water works division than it would be in a fire service? The idiosyncracies of the Fire Departments Act with its denial of any differentiation between supervisory and operational personnel in terms of the fire fighting service, of course, would deny to management any possibility of maintaining service if indeed a strike occurred. As an aside to this presentation, AMO has consistently advocated the separation of senior fire department officers from the main bargaining unit, a course possible under the Police Act but not contemplated by the Fire Departments Act. Perhaps these examples serve to illustrate some of the problems and even inconsistencies implicit in the philosophy of the present system and the legislation that supports it.

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1 While recognizing that compulsory and binding arbitration is the most apparent legislative recourse when impasse is reached in collective bargaining with fire fighters, it should be noted that the current Fire Departments Act does not prohibit fire fighters from striking or employers from locking out these employees.

The methods of binding arbitration vary considerably. The Police Act provides for a single arbitrator. The Fire Departments Act provides for a three-man board, a chairman and union and management representatives, but provides for a single arbitrator for the resolution of grievances dealing with the interpretation or application of an agreement or award. Grievance arbitration under the Labour Relations Act provides for a single arbitrator, although technically the parties may invoke the board technique if this is established by the agreement and all other requirements, such as time limitation, are met. The Province has seemed unable to agree that any single system has advantage over any other and the total system is confusing in many respects to the parties that have to resort to arbitration.

Not only are there differing systems of arbitration, but because of the varying ministerial responsibility for the process, there are a variety of systems of application for arbitration, of appointment of arbitrators, the payment of fees and, to some degree, the authority under which the arbitrator operates. This latter aspect is reflected in the number of cases in which the jurisdiction of the arbitrator or boards is challenged in respect of some particular issue.

Legislators in Ontario have consistently refused to establish a set of criteria that would give consistency at least to the approach taken by arbitrators in considering the problems before them, although there might still be wide variation in the awards.

A further serious defect lies in the variety of limitations on the duration of an agreement. For example, under the Police Act or the Fire Departments Act the hearing may take place as much as ten or eleven months after the expiry of the agreement. Since retroactivity is back to the original anniversary date, no great pressure for settlement exists. The result is, however, that with the receipt of the award, bargaining for the next contract must begin almost immediately. The process itself has ensured that bargaining, with all its disruptive tensions, has become the normal state under which the organization functions.[2]

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2 The City of Scarborough as a result of a series of arbitration awards, and delays related thereto, on July of 1980 had no effective agreement beyond 1978.

On the other hand, the Hospital Labour Disputes Arbitration Act with its provision that the agreement may be from the expiry date of the previous agreement and continue until one year from the date of the award has addressed itself to this problem.

Perhaps the most serious defect of all is the absence in any permanent legislation of a recognition of the need for a more practical linking of award and funding to meet the cost.

The Honourable Larry Grossman, Treasurer of Ontario, has expressed the Government's policy on this matter by including the "ability to pay" concept in the Public Sector Prices and Compensation Review Act, 1983 (Bill 111). AMO is pleased with the inclusion of this concept in this Act and views it as demonstrating the need for the same type of criteria in permanent legislation.

To illustrate the problem, take the example of a municipally-operated nursing home. The arbitration award may well come down nine months after the expiry of the agreement. Since the revenue of the home is limited by the per diem charge established by the Province and on a universal basis with no special regard to the financial situation of any individual home, the effect of this unforeseen charge may be disastrous to the operation of the particular home affected by the award. The home is faced with a situation in which the Province, having limited its revenue by the per diem allowance and having imposed binding arbitration, has failed to recognize the link between these actions.

The Fire Departments Act has foreseen this problem and requires the municipality to provide in its annual budget for an amount equal to the maximum that might be awarded in arbitration, that is, the total of the fire fighters' association's demands. This seems a most unnecessary tying up of financial resources always in short supply. Such a rule-of-thumb allocation makes a mockery of any serious attempt by a municipal council to allocate its funds in the interests of the electorate and gives a special protection to fire fighters not available to any other group in either the private of public sector of the economy.

Perhaps the most glaring weakness of the binding arbitration process is the lack of direction given to arbitrators. For the most part, unfettered by responsibility, unguided by demonstrated economic limitations, and with no policy or criteria to direct them, arbitrators are given the task of solving the most intricate of problems involving subtleties of interrelationship of people, the responsibility of meeting

political obligations by the allocation of funds chronically in short supply, and the analysis of complicated economic data. Because of the complications of the issues to be resolved, arbitrators tend to reduce them to a simple management-worker problem giving little or no weight to the wider implications of public policy. If the results are frequently unsatisfactory to one or both of the parties, it is hardly to be wondered. Since acceptability must perforce be a criterion for acceptance as an arbitrator, it is little wonder that arbitrators continue to seek to woo one of the parties as an ally. Few chairmen of arbitration boards hope for a unanimous award, but even fewer would run the risk of repeatedly alienating both sides. This attitude frequently is discerned, as well, in the awards of single arbitrators. Perhaps the description of the current process has established the problems municipalities experience and the need for reform.

## 2. THE NECESSITY FOR SERIOUS BARGAINING

To this point the Association has considered, in some detail, the defects of the arbitration process as it is in operation. Likely there is total agreement that the process is a second best method of resolving disputes and a most unsatisfactory substitute for good collective bargaining. On occasion there may be a tendency for either or both parties to shirk responsibility and for a variety of reasons, mostly self-serving, to leave the hard decisions needed for the resolution of a dispute in the hands of an arbitrator. Any system of binding arbitration should assure that serious bargaining has taken place.

The Association therefore recommends:

1. That compulsory conciliation, mediation, or other non-binding intervention be employed before continuing to binding arbitration.

Conciliation as a process is analogous to bargaining as it allows great flexibility to the parties involved. Positions and terms are proposed, discussed, accepted, modified or rejected. The absence of this process almost invites the parties to sidestep their responsibility and leave the solutions to a third party.

## 3. A PROPOSAL FOR RATIONALIZING THE COMPULSORY AND BINDING ARBITRATION PROCESS IN ONTARIO

In an earlier section the Association demonstrated that the present systems of compulsory and binding arbitration are inconsistent, frequently cumbersome and generally in need of rationalization. The following section sets forth the Association's proposal for reform.

### 3.1 The Unity of Public Service

Surely the different elements of the so-called essential public service are not so disparate that they require techniques of binding arbitration as differing as those provided by the Police Act, the Fire Departments Act, and the Hospital Labour Disputes Arbitration Act, and where applicable, the Labour Relations Act.

#### 3.1.1. The Board of Arbitration

The proponents of the single arbitration system based their preference on the question of cost and the more expeditious arrival at decision, and both of these factors have validity. On the other hand, the essence of successful arbitration is acceptability or at least a feeling by both sides that their case has received thorough, professional and independent consideration. It is the Association's view that probably these ends can be best achieved by a three-man board where, in the event that the sidesman for either management or labour feels that the award fails to represent adequately or deals unfairly with his views, he may dissent with reasons and his dissent is part of the formal record. This dissent is highly significant in developing and modifying the precedents which inevitably must arise from every award.

The dissent focuses attention on the fact that the issue is not simple and the dissent may well have great significance in the application of the principle to another case similar but not necessarily identical.

#### 3.1.2. The Cost of Arbitration

For the sake of consistency the cost of arbitration should be shared, each party paying his nominee, and the honorarium or fee of the chairman and his costs shared by the parties. This is the principle of both the Police Act and the Fire Departments Act but is not the principle established by the Hospital Labour Disputes Arbitration Act for paying these costs.

The Government should consider the establishment and maintenance of an appropriate fee schedule for chairmen of arbitration boards. It is important to note that the setting of unrealistically low fee schedules has resulted in the refusal of some arbitrators to act. On the other hand, it is equally unjust that unreasonably high fee schedules be borne by public funds.

3.1.3. The Administration of Arbitration

The administration of arbitration should be removed from the individual ministries and be put under the direction of a Labour Arbitration Commission similar to, but unrelated to, the Ontario Labour Relations Board. The less than overwhelming success of this system in the past has been due to limitations to the mandate given the Commission.

The Commission itself would be responsible to the legislature, reporting to Cabinet through a committee of senior ministers, possibly the Ministers of Municipal Affairs and Housing, Labour, and the Solicitor General.

The Commission would be charged with training and accrediting arbitrators, and with administering the total system of compulsory and binding arbitration.

The Commission would be responsible for reviewing interest arbitration awards to be assured that they were not contrary to public policy or interest. This review would take place prior to the release of the award.

The Commission would not be empowered to change the award but rather to refer it back to the board of arbitration for further consideration.

Implementation of these changes would go far to rationalize the system, and to alleviate confusion. The review process would assure that, in the public sector, public policy was not flouted simply because an arbitrator did not agree with, or simply because public policy was not entirely compatible with, the solution he wished to impose. The present lack of regard to public policy simply results in arbitrators usurping political power which more properly should be retained by government including municipal councils whose power lies in their election, a manner of selection more significant than appointment.

**The Association therefore recommends:**

**2. That there be a recognition that the public service is an entity, that collective bargaining is also an entity, and that if binding arbitration is to be invoked, there should be a single system administered by a single agency and consistent as to procedures, formation, qualifications of the arbitrator, payment of costs and so forth for those services now subject to the process.**

**3.2 Criteria for Arbitrators**

**As has just been suggested, compulsory and binding arbitration is counterproductive if it fails to serve the public interest and frustrates public policy.**

**Perhaps some of the dissatisfaction with the process lies in the fact that the Government has failed to establish, by statute, criteria for the resolution of public service disputes.**

**It is highly discriminatory that no criteria exist in the legislation affecting arbitrations coming under municipal interest, while the Provincial interest is deemed to need protection.**

**The Crown Employees Collective Bargaining Act provides general criteria. While the broadness of the statements does not serve to focus on basic issues as intensely as the Association would like, at least it rescues arbitrators from the vacuum of other binding arbitration legislation.**

**The specific criteria AMO would suggest are as follows:**

**In the conduct of proceedings before it and in rendering a decision in respect of a matter in dispute, the board of arbitration shall consider any factor that to it appears to be relevant to the matter in dispute including,**

**a) the terms and conditions of employment in other municipalities;**

**b) the terms and conditions of employment in other occupations in the public and private sectors as the board of arbitration may consider relevant;**

c) the needs of the council of the municipality for qualified employees;

d) the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered;

e) the desirability to maintain appropriate relationships in the terms and conditions of employment as between different classes of employees;

f) general economic conditions in the community, the province and the nation and the fiscal policies of the Government of Ontario; and

g) the interest and welfare of the public.[3]

It is the Association's belief that in addition, insofar as municipalities are concerned, every arbitrator in making his award should be required to give reasons why in his view the award is in the interest of the public and has taken into consideration the local economy. Conformity to public policy would be one aspect of protecting public interest. For example, an award that established labour costs by providing salaries and benefits in excess of guidelines established by the Province to assure spending restraint, would be deemed contrary to public interest.

In public service labour disputes it is not clearly established that management (including the municipal council) is able to disassociate itself from the basic confrontation and view the matter in the broader context of public interest. The considered views of a skilled and independent arbitrator would therefore be highly significant in developing public opinion and acceptance of the terms of the award. The reasoning of the award bringing the matter forcefully to the public notice would allow for cooler and, hopefully, more rational consideration.

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3 Section 7(5) of the 3rd Draft Fire Departments Act currently in the final stages of review by the Ministry of the Solicitor General.

The Association feels that at present the zeal of arbitrators in reaching a resolution that will satisfy one party frequently fails to take into consideration the broader and more fundamental issues that concern public interest.

The Association therefore recommends:

3. That arbitration proceedings be guided by a set of criteria established by statute and designed to assure the promotion of the public interest and to avoid the frustration of public policy. These criteria should be similar to those set forth in the proposed draft amendments to the Fire Departments Act currently under review by the Ministry of the Solicitor General. Specific reference to public interest, public policy and local economic conditions would then be addressed adequately.

### 3.3 Choice, Training, Accreditation of Arbitrators

The Association believes, in the final analysis, the details regarding the choice, training and accreditation of arbitrators would have to be worked out progressively by the Labour Arbitration Commission after due consultation with labour, management and the Government. Indeed, the Ministry of Labour seems to be moving in this direction by establishing a revised panel.

AMO would, however, raise one problem which is of concern in Ontario. Much of the criticism of arbitration is based on the fact that the present panel of available arbitrators is heavily weighted in favour of academics, especially law professors, and would appear to give little recognition to the need for a wider variety of disciplines and skills (economics, management, business, administration and the like).

Part of the problem is that the profession of arbitrator is not a full-time profession but is a supplementary vocation. Careful consideration should be given to the establishment of at least a core of permanent, full-time arbitrators representing a wide range of training, background and experience who could be given status and tenure equivalent to senior members of the judiciary and who could form the basis of the review tribunal which AMO has suggested.

It is of paramount importance that the decisions of arbitration become more positively factual and less based on speculation and theory. Surely, at heart, the problems of labour disputes are economic and therefore practical, and thus arbitration awards should be less extensively used as instruments of social change or for the promulgation of social theory than would appear to be the case at present.

The Association therefore recommends:

4. That there be a system for accrediting and providing training for arbitrators (either single or chairmen) and that there be a small core of full-time arbitrators with tenure.

### 3.4 Review Procedures

As the practice of labour management arbitration has progressed, it has been held, at least to a degree, to be analogous to a legal procedure although in fact the issues are more likely to involve economic and human relations and, in the public service, political issues. Even where legal issues are involved, arbitrators frequently impose solutions that go beyond legal jurisprudence and in fact, implement social change. Thus, arbitrators cite former awards to justify their decisions and these are deemed precedents. Yet, in law, the essence of precedent is that it is sound law (no such test is possible in labour relations) or that it has been reviewed by another tribunal and adjudged to be sound.

In those matters involving the public service which are sent to arbitration, the test must be, does the decision conform to or thwart public policy? Does it make sense economically and is it valid and acceptable in terms of society's views of appropriate human and sociological relationships?

If the concept of precedent is to be used, there must be some way of reviewing the decisions by persons expert in the field; hence, the Association's recommendation that this responsibility be assigned to the cadre of expert arbitrators. A panel of three of these seniors should automatically review every award. The purpose of the review would not be to weaken the position of an arbitrator but to allow for reconsideration if an independent and expert body felt this action necessary. For the most part, such reconsideration would be directed to issues of excessive cost, public policy and the effect of the award in terms of the public interest.

The Association therefore recommends:

5. That a system of automatic review of awards be established so that prior to issuing the award the arbitrator could reconsider the implications of the award on the public interest and public policy.

3.5 Recognition of the Linkage Between Arbitration and the Funding of Special Services

Many of the problems of municipal collective bargaining result from a failure to recognize this connection.

Municipalities, as creatures of the Province, are increasingly working in a cooperative arrangement with the Province in providing services. Classic examples are municipal homes for the aged, nursing homes, day care centres and an increasing range of social services. Here the responsibility of provision and management of the services has been delegated to the municipality. The level of service is dictated by the Province and revenue is controlled by the limitation of funding whether on the basis of the per diem rate that may be charged or by the application to any subvention of a percentage growth factor, frequently somewhat less than the rate of inflation.

In any event, the effect is that the Provincial Government establishes a program of restraint or limitation of financial support on the one hand, while failing to put any limitations on the results of arbitration which it insists must be final and binding and without appeal. The municipality is crushed between two Provincial millstones.

While the Association would not suggest that the Province set up a policy that would meet deficits rising from this collective bargaining process, AMO does feel that Provincial policies must be considered in bringing down awards and if the award is substantiated by the review process proposed, the Province should be prepared to share with the municipality the added expense which would not be foreseen or provided for in normal budgeting.

The Association therefore recommends:

6. That there be recognition by the Provincial Government of the linkage between the arbitration process and the funding of the public service.

### 3.6 Duration of Agreement

Frequently arbitrators are hampered in developing solutions to problems which would be more acceptable if in fact the time span for implementation were to be extended over a period longer than a year.

For example, if salaries are to be adjusted substantially this may be more effectively achieved by the use of a progression of increases.

If stability of labour costs is indicated as a desirable end of collective bargaining in the interest of developing a sound employer-employee relationship, the extended collective agreement may be a solution.

Normally the imposition of a term longer than a year would be with some measure of consensus of the contracting parties or would reflect a trend in other sectors. Nevertheless, such action should not be precluded by legislation.

It is felt that to ensure against abuse, the term of agreement that might be imposed would be not less than a period of twelve months and not greater than a period of twenty-four months.

The Association therefore recommends:

7. That where in the judgement of the arbitrator or chairman the interests of sound collective bargaining relations require a term for an agreement longer than one year, he be empowered to impose a term for the agreement not to exceed a period of twenty-four months and, in any event, not less than twelve months.

## 4. GENERAL

Not all jurisdictions have put as heavy a reliance on compulsory and binding arbitration in so-called essential services as has Ontario. Several provinces allow strikes even in essential services, and this also is allowed in American jurisdictions. It is felt that the Province might well consider studying this other experience and especially techniques that would force both sides to bargain collectively avoiding the too-early invoking of compulsory and binding arbitration.

Such a study should be made only in the context of the Police Act, the Fire Departments Act, the Hospital Labour Disputes Arbitration Act, and the Labour Relations Act and the imposition of binding arbitration. The study of the experience and legislation should give consideration to the necessity of excluding supervisory personnel from the general bargaining unit.

In the final analysis, as long as binding arbitration is readily available and the results are so patently advantageous, employee groups have nothing to lose. While the rationalization of the existing system or creation of a new system may be an improvement, it must be stressed that there is no substitute for sound industrial relations and collective bargaining based on trust, integrity and common sense.

Any system of arbitration that vitiates these essentials and reduces the pressure on the parties to settle themselves is a bad system.

## 5. SUMMARY OF RECOMMENDATIONS

1. That compulsory conciliation, mediation, or other non-binding intervention be employed before continuing to binding arbitration.

2. That there be a recognition that the public service is an entity, that collective bargaining is also an entity, and that if binding arbitration is to be invoked, there should be a single system administered by a single agency and consistent as to procedures, formation, qualifications of the arbitrator, payment of costs and so forth for those services now subject to the process.

3. That arbitration proceedings be guided by a set of criteria established by statute and designed to assure the promotion of the public interest and to avoid the frustration of public policy. These criteria should be similar to those set forth in the proposed draft amendments to the Fire Departments Act currently under review by the Ministry of the Solicitor General. Specific reference to public interest, public policy and local economic conditions would then adequately be addressed.

4. That there be a system for accrediting and providing training for arbitrators (either single or chairmen) and that there be a small core of full-time arbitrators with tenure.

5. That a system of automatic review of awards be established so that prior to issuing of the award the arbitrator could reconsider the implications of the award on the public interest and public policy.

6. That there be recognition by the Provincial Government of the linkage between the arbitration process and the funding of the public service.

7. That where in the judgement of the arbitrator or chairman the interests of sound collective bargaining relations require a term for an agreement longer than one year, he be empowered to impose a term for the agreement not to exceed a period of twenty-four months and, in any event, not less than twelve months.

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